

**HIGH COURT OF ORISSA
CUTTACK**

CRIMINAL APPEAL NO. 118 OF 1983

From the judgment dated 26.03.1983 passed by Sri D. C. Guru, Addl. Sessions Judge, Sambalpur in S.T. No.70/11 of 1982.

Babaji Seth & others Appellants

Versus

State of Orissa Respondent

For appellants : M/s A. K. Mohapatra,
K.N. Parida and
B. Mohanty.

For respondent : Mr. S. Behera,
Addl. Govt. Advocate

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 18.04.2007

PRADIP MOHANTY, J. This criminal appeal is directed against the judgment and order dated 26.03.1983 passed by the learned Addl. Sessions Judge, Sambalpur in S.T. No.70/11 of 1982, whereby appellant no.1 has been convicted under Sections 325 and 323 IPC and sentenced to undergo R.I. for five years for the offence U/s 325 IPC and R.I. for three months for the offence U/s 323 IPC, the sentences to run concurrently; appellant nos. 2 and 3 have been convicted under Section 325 IPC and sentenced to undergo R.I. for five years each; and appellant no.4 has been convicted under Sections 304 and 326 IPC and sentenced to undergo R.I. for eight

years for the offence U/s 304 IPC and R.I. for four years for the offence U/s 326 IPC, the sentences to run concurrently.

2. The case of the prosecution in a nutshell is that Gobardhan Mahakud (P.W.13) purchased the disputed land from accused-appellant no.1, Babaji Seth, by a registered sale deed. On 11.11.1980 while Gobardhan Mahakud was reaping paddy crop from the disputed land with the help of his relations and labourers, the accused persons came there being armed with deadly weapons like bow and arrows, tangi, axe, iron rod, lathis, etc., and challenged the deceased Chandra Mahakud. Accused-appellant no.1, Babaji Seth, shot an arrow at Chandra Mahakud which did not hit him. Thereafter, accused-appellant no.4, Bharat Seth dealt tangi blows on his legs, due to which he fell down with severe bleeding injuries and other accused persons also assaulted him there. At that time, Prafulla Kampa (P.W.11), who was passing by, saw the assault on Chandra Mahakud. When he came and protested, accused-appellant no.1, Babaji Seth shot an arrow at him, which hit his belly. While P.W.11 was running away, accused-appellant no.4, Bharat Seth dealt a tangi blow and accused-appellant no.3, Dasarath @ Suru Seth dealt an axe blow due to which he fell down and the other accused persons also assaulted him. The incident was informed to Padmalochan (P.W.2), the brother of Prafulla, who came to the spot and took Prafulla for treatment. Padmalochan reported the matter to the police and after due investigation charge-sheet was submitted against the accused persons.

3. The plea of the accused persons is that the disputed land was not sold to Gobardhan Mahakud and Gobardhan Mahakud never possessed the same. Accused Babaji Seth had grown paddy crop on the disputed land in the year of occurrence, but Gobardhan Mahakud got the same reaped in unripe condition on the date of occurrence. Accused Babaji Seth, Kalia Seth and Bharat Seth went to protest, but Chandra Mahakud dealt tangi blows on them and other labourers

attacked them with sickles. Accused Bharat snatched away the axe from Chandra Mahakud and waived the same in his self-protection which might have hit Chandra Mahakud. In other words, the accused persons have taken a plea of right of private defence and property.

4. In order to prove its case, prosecution examined as many as 18 witnesses including the injured and proved 29 documents. The defence has examined only one witness and proved two exhibits.

5. The learned Addl. Sessions Judge, Sambalpur, who tried the case, on appreciation of the evidence and other materials available on record, while acquitting the co-accused Sitaram, convicted the appellants as aforesaid on the finding that accused Babaji Seth and his sons were creating disturbance in the possession of Gobardhan Mahakud over the disputed land taking advantage of mention of wrong plot numbers in the sale deed. The trial court also recorded a finding that mention of wrong plot numbers in the sale deed cannot entitle the accused persons to take resort to right of private defence of property. The trial court also opined that the injuries on the body of the deceased were ante mortem in nature.

6. Mr. Panda, learned counsel for the appellants submits that during pendency of the criminal appeal, appellant no.4-Bharat Seth died. None of his relatives have come forward to continue the appeal on his behalf. In view of the above, the appeal is abated so far as it relates to appellant no.4-Bharat Seth. On the merits of the case, learned counsel for the appellants submits that the trial court has not scrutinized the evidence properly. He further submits that the trial court has committed error in disbelieving the evidence of the private witnesses. There is contradiction in the evidence of P.Ws. 5, 11 and 13. Further, the injuries sustained by Prafulla are not grievous in nature to attract the provisions of Sections 324, 325 and 326 IPC and, therefore, the impugned judgment of conviction of the respective appellants under those sections is to be set aside. Moreover, the age of appellant no.1 is more than 70 years and

that of appellant nos.2 and 3 is more than 50 years. Keeping their old age in mind, they should be leniently dealt with.

7. Mr. Behera, learned Addl. Govt. Advocate vehemently submits that the evidence of the eye witnesses, P.Ws. 5, 11 and 13 is clear and cogent with regard to the occurrence and there is no major contradiction in the evidence of these witnesses. Basing on such evidence, the trial court has passed the judgment and no fault can be found with the same.

8. Perused the LCR, more particularly, the statements of witnesses and exhibits. P.W.1 is a post-occurrence witness. P.W.2, the informant, is also a post-occurrence witness and he stated that he heard the incident from one Krushna Mahakud, proceeded to the spot and there he heard about the incident from his brother, whereafter he lodged the FIR. P.W.3 is a constable and a witness to the inquest. P.W.5, who is an eye witness, stated that the accused Babaji was holding bow and arrows, accused Bharat (since dead) was holding a tangi, accused Suru was holding a Barchha, and accused Kalia and Sitaram were holding sticks. The accused persons challenged the deceased Chandra Mahakud as to why he was reaping the paddy crop, to which the deceased replied that he was reaping the paddy grown by him. At this, accused Bharat (since dead) dealt one blow with the sharp side of the tangi on the left leg of Chandra Mahakud. Thereafter, he dealt a similar blow on his right leg, due to which the latter fell down. At that time, Prafulla Kampa (P.W.11) came there and asked the accused persons why they were injuring an old man. Thereupon, all the accused persons assaulted him. P.W.10, who is another eye witness, corroborated the statement of P.W.5. P.W.11, who is the injured and an eye witness to the occurrence, has specifically stated that accused Babaji Seth shot an arrow at Chandra Mahakud, which did not hit him. Accused Bharat (since dead) ran towards Chandra and dealt a tangi blow on his left knee and thereafter another blow on his right thigh, due to which Chandra fell down. He

(P.W.11) ran to the spot and asked Bharat as to why he was assaulting an old man. Accused Bharat suddenly dealt one tangi blow on his right wrist causing bleeding injury. As he tried to run away, accused Babaji Seth alias Guhalu shot an arrow which hit the upper portion of his belly just below the ribs. Even after sustaining the arrow shot he was running away, but accused Bharat dealt a tangi blow on the right calf of his leg below the knee resulting in bleeding injury, due to which he fell down. Accused Surubabu dealt one axe blow from the blunt side on his left ankle. Thereafter, accused Kalia dealt a lathi blow on his head and accused Babaji gave a lathi blow on his left arm. This witness has identified all the M.Os., i.e., tangi, arrow, lathi, etc. Nothing has been elicited from P.W.11 during cross-examination to discredit his testimony. P.W.12 is another eye witness. He corroborated the statements of P.W.11, the injured. P.W.13 has also corroborated the statement of P.Ws.11 and 12. P.W.8 is the doctor, who gave first aid to the injured (P.W.11). He found nine injuries. On police requisition, the injured was examined by P.W.15, who found eleven injuries including two fractures. P.W.9 is the doctor who conducted postmortem over the dead body of the deceased. He opined that the death was homicidal. The cause of death was due to haemorrhage from the severed femoral artery, vein and profunda femoris artery and consequent shock. P.W.17 is the doctor who examined the accused persons and marked some simple injuries, i.e., swellings and bruises. P.W.18 is the investigating officer.

9. In the instant case, no x-ray plate has been proved to establish the fractures sustained by P.W.11. It is the settled principle of law that non-production of x-ray plates by the prosecution creates doubt against the prosecution. Prosecution has also failed to prove that the injured suffered severe bodily pain for more than twenty days. In view of the above, it can safely be inferred that all the injuries were simple in nature.

10. As to the assaults made to the deceased, the grievance is mainly against appellant no.4, who is already dead and the appeal, so far as it relates to him, has abated.

11. Coming to the role played by the individual appellants in assaulting P.W.11, it is seen that appellant no.3 gave one blow by the blunt side of the axe. Since the injuries sustained by P.W.11 are simple in nature, but the weapon used by appellant no.3 is a deadly one, conviction of this appellant under Section 325 IPC cannot be sustained and he should be convicted under Section 324 IPC. So far as appellant no.1 is concerned, since the injury caused by the arrow shot is simple in nature, his conviction under Section 325 IPC cannot stand, but his conviction under Section 323 IPC is upheld. Similarly, appellant no.2 had given a lathi blow to the head of P.W.11, and the injury caused for such assault was simple in nature. Therefore, his conviction under Section 325 IPC should be altered to one under Section 323 IPC. Both appellants 1 and 2 having been convicted under Section 323 IPC, each of them are sentenced to the period of imprisonment already undergone and pay a fine of Rs.1000/- (one thousand), in default to undergo rigorous imprisonment for six months. Appellant no.3, for his conviction under section 324 IPC, is also sentenced to the period of imprisonment already undergone and pay a fine of Rs.1000/- (one thousand), in default to undergo rigorous imprisonment for six months. If the fine amount is realized, same shall be disbursed to the injured.

12. In the result, the appeal in respect of appellant no.4, Bharat Seth, stands abated. In so far as the other appellants are concerned, the appeal is dismissed subject to the modification in conviction and sentence as indicated above.

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PRADIP MOHANTY, J.